89-499

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD K. FIRTH; RICK FIRTH REALTY, INC.; FIRTH CONSTRUCTION CORPORATION,

PETITIONERS,

VS.

SOLGAR MARYLAND REALTY, INC.; SOLGAR COMPANY, INC.; ALLEN SKOLNICK,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a Federal District Court assume diversity jurisdiction on the basis of a removal petitioner's conclusionary allegation with respect to the principal place of business without evidentiary support? Should it in any event exercise jurisdiction over a disputed general partnership for development of land located in the plaintiff's State?

2. Where plaintiff's affidavit states that the parties in the presence of witnesses orally agreed upon a partnership and adopted and applied a draft written agreement, was it error for the District Court to grant summary judgment on the basis of plaintiff's failure to answer by affidavit some of 41 hypothetical questions? Has the District Court substituted trial by

affidavit for trial by jury?

3. Should repudiation of a contract commence the running of the statute of limitations when the time for complete performance has not yet arrived? Should this Court sustain the District Court's views reversing the long standing precedent that repudiation constitutes an anticipatory breach which does not commence the running of the statute of limitations but instead affords the aggrieved party the option to sue at the time of that breach or, alternatively to insist upon performance?

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Solgar Maryland Realty, Inc. et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam decision of the Court of Appeals, its order denying the petition for rehearing and suggestion for rehearing in banc, and the decision and order of the District Court were not published. They are reproduced in Appendix A.

JURISDICTION

The decision of the Court of Appeals was entered on April 28, 1989 and the final order denying the petition for rehearing and suggestion for rehearing in banc was entered June 5, 1989. This petition is being filed within ninety days of the latter date.

This Court's jurisdiction is invoked

under 28 U.S.C. Sec 1254(1)

.STATUTES INVOLVED

The statute involved is the Maryland Uniform Partnership Act. Annotated Code of Maryland, Corporations and Association, Sec. 9-101 et seq.

STATEMENT

Procedural History

This is an action brought by the Petitioners, Richard K. Firth, and two companies he controls, against Respondents Allen Skolnick, and two companies he controls, Solgar Company, Inc. and Solgar Maryland Realty, Inc., for breach of a partnership or joint venture agreement. The action was originally brought in the Circuit Court for Worcester County, Maryland, and was removed to the United States District Court for the District of Maryland, pursuant to Respondent's petition for removal. Prior to discovery and trial on the issues, Respondents filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the

Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted which was opposed by Petitioners. In that motion Respondents raised 41 hypothetical questions concerning the nature of the contract. The District Court, treating the motion as one for summary judgment under Rule 56, granted it without hearing and prior to any discovery, on the ground that certain of the 41 questions had not been answered and therefore the partnership agreement was too uncertain and indefinite in its terms to be enforceable, and further, that the statute of limitations had run. The Appeals Court affirmed the District Court in a per curiam decision which is on appeal here.

Petitioners' Position

Petitioners' position may be simply stated. They entered into an oral partnership contract with Respondents for the development and sale of a parcel of resort land, with the framework of this agreement bottomed on a previous written draft joint venture agreement. The Respondents have now abandoned Petitioners and are in breach of this agreement. In view of Respondents' actions, Petitioners now assert their rights under the partnership agreement, claiming their proper share of profits made from the sale of the parcel of land involved.

Factual History

On July 7, 1981, after Respondents

had entered into a contract for the purchase of the land involved here which had been brokered by Petitioners, Respondents' principal, Mr. Skolnick, and Petitioner Firth met in the presence of a number of witnesses and agreed to adopt and apply to the the property involved a draft joint venture agreement previously prepared by the Respondents' attorneys on August 24, 1979.(Appendix C). Thereafter, Skolnick and Firth announced their joint venture to the directors of the owners' association who would have to approve any development. The agreement provided for the formation of a "partnership or joint venture for the acquisition, development and eventual sale" of the property, with the Respondents providing funds "for acquisition and development of" the property and the

Petitioners "serving as general contractor, and working partners, having day to day responsibility for supervising the development of the project." The written draft agreement upon which the oral agreement was bottomed had been designed for an earlier participation in a similar development project with respect to a different nearby parcel of land but had not become operative because that property had not been acquired. Of special significance, the agreement provided for profit participation by Petitioners because they "had made possible the purchase of this property" irrespective of whether Respondents should exercise their right of "complete discretion to replace" Petitioners as the general contractor. The agreement also provided a specific

basis for the division of profits at various monetary levels.

The property then lay dormant for some years due to a sewer moratorium and bulkheading problems which precluded its immediate development. On June 1, 1984, after it had been brought to Respondents' attention that Petitioners and a third party had become involved in a dispute concerning reservations for the sale of lots in the property, Respondents in their handling of that matter wrote to Petitioners that they "did not want publicity on [the property], and since there is no agreement between us that you were not to associate your name with" the property. After this letter in response to his lot reservation activity was received, Petitioner

ceased this activity and wrote three letters during the summer requesting Respondents to reflect upon and move forward with their partnership. On September 6, 1984, Respondent Skolnick finally replied denying the existence of any partnership or mutual agreement. Skolnick's attorney also told Petitioners in later discussing Respondent's change of attitude that he too thought he had been a partner with Respondent.

After failing to convince Respondents to honor their agreement, Petitioners filed suit on September 2, 1987. While no sales of property had been made at that time, Respondents have since developed and accepted reservations for about 38 percent of the salable lots independently of

Petitioners.

In view of Respondents' actions, Petitioner now assets its rights under the partnership agreement, claiming its agreed upon share of any profits made in the development and sale of the parcel of land involved which are only now maturing as the sales progress.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Fail To Address Jurisdictional Facts, To Reveal Any Investigation Of, Or To Make The Requisite Findings Relating To The Existence Of Diversity Jurisdiction Despite The Established Duty Of The Lower Courts To Do So

It is indisputable that jurisdiction is basic and indispensable for the handling and deciding of cases in the federal courts. Here where such jurisdiction is solely dependent on diversity of citizenship under 28 U.S.C. 1332, and it is questioned, it is the duty of both trial and appellate courts to investigate to determine whether proper jurisdiction lies. 32 Am Jur2d Federal Practice and Procedure,

Sec. 1276. See Belle View Apartment v. Realty ReFund Trust, 602 F.2d 668 (4th Cir. 1979).

Accepting and retaining diversity jurisdiction without investigation when there is any reason to question it is also contrary to the very realistic position shared by many knowledgeable experts, particularly in recent years, with respect to the growing caseloads in federal courts and the recognition that provincialism in State courts has all but disappeared. This has lead to efforts to reduce the number of cases moving to the federal courts via diversity jurisdiction culminating in the recent recognition of the urgency of the problem by Congress in the amendment providing for a rise in the amount in controversy requirement. And,

the problem has been consistently recognized by the Judicial Conference of the United States which continues to reaffirm its long-standing request that diversity jurisdiction be eliminated and alternatively to support other measures designed to more extensively restrict the extent of diversity litigation. Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987, p.72 and September 14, 1988, p.23 (GPO Washington D.C. 1987 & 1988)

In view of this, it is not only reasonable but very important to the system that the federal courts actually practice judicial economy in considering whether cases presented to them definitely involve diversity jurisdiction, particularly as the

statutory guidelines are narrowed.

Clearly then, when there is any question, it would be preferable and in accord with practicality, judicial economy and good procedure for federal courts to actually investigate and make factually supported findings with respect to diversity jurisdiction vel non rather than accept conclusionary allegations by the party seeking federal jurisdiction. This is particularly true where the party seeking such jurisdiction clearly best knows the facts with respect to diversity, and the adverse party is unable to contravene the allegation in the absence of discovery.

Here Petitioners did object to Respondents' motion to quash service

upon a non-diverse corporate defendant (Respondent Solgar Maryland Realty, Inc.) pointing out that "the question of proper parties defendant should await development [of their status and responsibilities] at the discovery stage of these proceedings" together with a determination as to "whether, in fact [that defendant] still continues to do business in the State of Maryland." Moreover, the diversity issue was presented to the Circuit Court which should have considered it. Belle View Apartments v. Raltu ReFund Irust,602 F.2d 668 (4th Cir 1979)

Here, the existence of diversity for jurisdictional purposes depends on a determination of the Respondents' principal place of business and that is a question of fact. United Nuclear

Corporation v. Moki Oil and Rare Metals Co., 364 F.2d 568 (10th Cir. 1966). This is to be determined on a case-by-case basis through review of the Respondents' total activity, taking into account such factors as the character of the entity, its purposes, the kind of business in which it is engaged, and the status of its operations, including a comparison of the character, importance, and scope of the activities conducted in each state where operations are conducted. See 6 ALR Fed. 436, Diversity - Principal Place of Business.

Without the benefit of discovery, Petitioners are aware that, in addition to holding title to the Maryland land involved in the partnership, Respondents have substantial assets and

operations in Maryland. The resort property involved here is valued at close to $20,000,000 and they also own at least five other nearby pieces of property as well as operate a Nutritional Center in the area. In addition, Respondents are involved in the development of a 257 acre exclusive planned community which will have an 18-hole Gary Player Golf Course, 7 championship tennis courts, indoor tennis and fitness facilities, indoor lap and outdoor swimming pools, a restaurant, a 200 ship marina and a multimillion dollar clubhouse.

Clearly where the jurisdiction must depend solely on diversity, the crucial question of the location of the Respondents' principal place of business for the purpose of diversity

jurisdiction is not a legal presumption derived from conclusionary allegations, but a purely factual question that must be addressed before the requisite findings can be made for diversity jurisdiction under 28 U.S.C. Sec. 1332(C). Accordingly, as the Courts below have failed to state the basis for jurisdiction and have not investigated, addressed facts or made findings pertaining to diversity jurisdiction, Petitioners seek a remand of the proceeding here for such a determination after opportunity for discovery and investigation have disclosed the operative facts regarding the necessary diversity jurisdiction.

Such action will result in a necessary stiffening of the practices connected with granting diversity

jurisdiction and enure to the benefit of the federal judicial system and the parties that it serves.

2. The District Court Substituted Trial By Affidavit For Trial By Jury And Implicitly Made Credibility Assessments Constitutionally Reserved To The Jury.

Respondents' memorandum in support of the District Court motion to dismiss raised some 41 questions concerning the Firth-Skolnick agreement.(App. D) If these 41 questions were deemed to be interrogatories in discovery, they would be objectionable as exceeding the District's Local Rule 6 limitation to 30 interrogatories. As an attack upon Respondents' counsel's own August 24, 1979 letter agreement proposal of a joint venture (App. C), Respondents

would seem to have been estopped from raising those questions. In the context in which posed, namely in a memorandum of law they seem, at best, to be rhetorical questions of a hypothetical nature largely unrelated to the issues of anticipatory breach raised in the complaint.

The 41 questions raised by Respondents were nothing more than a red herring in that it is well established that the complaint need only plead the existence of a contract and those terms with which it seeks to charge the defendants. Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 A 904 (1894). The Maryland Partnership Act governs almost all relations between partners, unless otherwise indicated.

Much of the argument of Respondents was a subtle appeal to the District Judge to assess the credibility of Petitioners' affidavit and to weigh the evidence on the issue of the parties' intention to form a contract. Firth's affidavit stated that Firth and Skolnick orally agreed in front of witnesses to adopt and apply the August 24, 1979 proposal (for adjacent land) to the instant transaction. Respondents disputed this claim by affidavit and argued "inherent unbelievability";

> ... plaintiffs have presented a claim which, to anyone familiar in any way with business or real estate dealings, is absolutely incredible, i.e., that two companies would enter into a complex land acquisition and development deal with no written contract at all.
>
> Indeed, plaintiffs' recent

submission to the Court makes their claims even more ludicrous. For example, while plaintiff Firth emphasizes that there were numerous witnesses on July 7, 1981 to the announcement of a partnership between the parties , he does not submit an affidavit to the Court from a single one of these alleged witnesses. Similarly while plaintiff Firth claims that the parties orally agreed to "adopt and apply" the terms of a proposed agreement concerning Section 14-C, as set forth in a pre-existing written document, to Section 14-B, he never addresses the question of why these terms, which were unacceptable to the parties in 1979, should have become suddenly acceptable in 1981, and he also never answers the question of why, if the parties in truth agreed on July 7, 1981 to accept the terms of the agreement contained in a letter dated two years earlier, they simply did not sign the agreement as set forth in the document that had already been prepared. Moreover, one must wonder again at the fact that, although plaintiff has submitted voluminous documents to the Court, resulting in a stack two inches high, there is not a <u>single document</u> acknowledged or signed by Solgar over the course of more than eight years in which it recognizes that it has entered

> into a partnership agreement with the plaintiffs... summary judgment should not be denied by reason of outlandish or incredible assertions of a factual dispute.

However, it is well established that questions as to contract formation, intent of the parties, credibility and states of mind are for resolution in a trial by jury rather than trial by affidavit and should not be resolved by summary judgment procedures. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962) ("Trial by affidavit is not a substitute for trial by jury which so long has been the hallmark of evenhanded justice."); Pierce v. Ford Motor Co., 19 F.2d 910, 915 (4th Cir. 1951) (Summary judgment is not intended to allow a party to avoid a jury trial or for the judge to weigh evidence before the parties have had a chance to

present it."); Klein v. Weiss, 284 Md. 36, 395 A.2d 126 ("whether a partnership exists is always a matter of fact which must depend on the intentions of the parties."). See Miller v. Salabes, 225 Md. 53, 169 A.2d 671 (1961); M.Lit. Inc. v. Berger, 225 Md. 241, 170 A.2d 303 (1961); Townsend v. Appel Sons, Inc., 164 Md. 255, 164 A. 679 (1933); Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950) ("even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible under pleadings and affidavits."); Cram v. Sun Insurance Office, LTD., 375 F.2d 670, 674 (4th Cir. 1967); Charbonnages de France v. Smith, 597 F.2d 406, 414-15 (4th Cir. 1979 ("Disputes about

whether a contract has or has not been formed ... present interpretive issues traditionally understood to be for the trier of fact...[so] as to preclude summary judgment."

The District Judge deftly avoided explicit credibility findings. He claimed that "plaintiffs have foretold ... what these further particulars would be"; he assailed petitioners for having "facilely re-characterized what they allege the agreement to have been"; and he further rationalized that Petitioners' "dexterity in pleading underscores the necessity for an agreement sufficiently definite in its terms to preclude after-the-fact restructuring of what allegedly was agreed upon." However, these allegations when viewed in light of

Respondents arguments, strongly suggest that the District Judge assessed credibility.

When petitioners declined to deal with the 41 angels on the pin's head, the District Judge counted 6 favoring respondents and predicated his summary judgment thereon. The District Judge not only indulged in erroneous fact-finding on these jury questions but also improperly postulated a fully developed record on these 6 as well as on all 41 issues. The Judge assumed that petitioners "foretold ... their further particulars" as to 6 points (which Petitioners deny). A necessary corollary is that petitioners should have responded to all 41 and failed to do so at their peril. Moreover,the District Judge erred as a matter of law

in finding critical the absence of a provision in the agreement for losses. Under Maryland law where a joint venture is a form of partnership, the Uniform Partnership Act as enacted in that State makes each partner responsible for losses according to his share in the profits unless otherwise provided. Ann. Code of Md., Corps. and Assn's Sec. 9-401.("Each partner... must contribute towards the losses according to his share in the profits.")

3. The District Court On Summary Judgment Incorrectly Found That The Statute Of Limitations Had Commenced To Run From The Time Of Anticipatory Breach.

The District Court found the suit was

barred by the statute of limitations in that it was not filed until more than 3 years after a letter from Respondent on June 1, 1984 intimating there was no agreement with Petitioners.

Doctrine Of Anticipatory Breach Not Properly Considered Or Applied

In its complaint, Petitioners also complained of an anticipatory breach of the oral partnership. By implication, the District Court equated the Respondents' denial of a partnership contract with the express will to terminate such a partnership. However, it is well established that the denial of the existence of a contract is merely a repudiation, rather than a termination, so that the aggrieved party may at his election file suit

under the doctrines of anticipatory breach and anticipatory repudiation or await the time for final performance which in this case is the distribution of profits; and that time had not yet come. Roehm v. Horst, 178 U.S. 1, 19 (1899). Further, at 4 Corbin, Contracts, Sec. 989, page 967:

> "The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitations is held to begin to run against him immediately."

The foregoing demonstrates that Respondents' letters were no more than an anticipatory repudiation which does not commence the running of the statute of limitations.

The District Court's failure to apply the doctrine of anticipatory breach is error.

Alternatively, The Jury Should Have Been Allowed To Determine When Any Breach Took Place Rather Than The Court Using Summary Judgment

In any event, the question as to when the breach took place should properly have been one for the jury rather than the Court under the summary judgment procedure.

The Court in deciding that a statement in the June 1, 1984 letter from the Respondent constituted the breach failed to consider the facts surrounding that letter. The letter had

been written in relation to a dispute between Petitioners and another party and it generated three letters from Petitioners on the matter over the next three months culminating in a final letter from Respondent on September 6, 1984, denying the existence of a partnership contract. Based on this evidence and other evidence as to the relationship of the parties, a jury could reasonably have found that the breach of the partnership contract did not actually occur until the time of the September 6, 1984 letter. Such a finding would render the statute of limitations defense unavailable because of the date of filing suit. It was error for the Court to usurp the jury's function in this manner.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari be granted because this case presents justiciable federal issues which, unless resolved by this Court, (1) will countenance lower federal courts failing to scrupulously ascertain proper diversity jurisdiction contrary to 28 U.S.C. Sec. 1332 and to the detriment of judicial economy and efficiency; (2) will condone the practice of a federal court utilizing summary judgment sua sponte to deprive parties of their right to a jury trial on issues of fact by sanctioning trial by affidavit and decision upon irrelevant rhetorical questions as to contract formation as a substitute; and (3) would renounce the long-standing

doctrine of anticipatory repudiation.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2907

Richard K Firth; Rick Firth Realty, Inc.; Firth Construction Corporation,

Plaintiffs-Appellants,

v.

Solgar Maryland Realty, Inc.; Solgar Company, Inc.; Allen Skolnick,

Plaintiffs-Appellees,

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge.

(CA-87-3208-JFM)

Argued: March 7, 1989

Decided April 28, 1989

Before RUSSELL and MURNAGHAN, Circuit Judges, and STAKER, United States District Judge for the Southern District of West Virginia, Sitting by designation.

James W. Lawson for Appellants. Richard John Gabriele, Sr. (Meltzer, Lippe, Goldstein & Wolf, P.C. on Brief) for Appellees.

PER CURIAM:

The plaintiffs in this action seek to recover damages for the breach by the defendants of an alleged joint venture or partnership agreement between the plaintiffs and the defendants. The

District Court, after reviewing the record before it, granted summary judgment for the defendants. From this judgment the plaintiffs have appealed. We affirm on the well-reasoned opinion of the District Court. Richard K Firth, et al. v. Solgar Maryland Realty, Inc., et al., CA-87-3208-JFM (District of Maryland June 28, 1988, July 22, 1988).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2907

RICHARD K. FIRTH; RICK FIRTH REALTY, INC.; FIRTH CONSTRUCTION CORPORATION

Plaintiffs - Appellants

v.

SOLGAR MARYLAND REALTY, INC.; SOLGAR COMPANY, INC.; ALLEN SKOLNICK

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel

June 5, 1987

requested a poll of the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Murnaghan and Judge Staker.

For the Court,

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

RICHARD K. FIRTH, et al. Civil No.

JFM-87-3208

v.

SOLGAR MARYLAND REALTY, INC.,

et al.

OPINION

This action is brought by Richard K. Firth ("Firth Realty, Inc. against Solgar Maryland Realty, Inc., Solgar Company, Inc. (individually or collectively referred to as "Solgar") and Allen Skolnick, the principal of Solgar. It was originally instituted in the Circuit Court for Worcester County, Maryland and was removed to this Court on the basis of diversity of

citizenship.\1 Plaintiffs claim that Solgar breached an alleged oral joint venture agreement for the acquisition, development and eventual sale of certain

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\1. Two preliminary procedural motions are pending. First the two corporate plaintiffs - who were dismissed prior to removal because they had not appeared through counsel - have moved to be reinstated as parties. That motion is unopposed and is granted. Second, Solgar Maryland Realty, Inc. has filed a motion to quash service on the ground that it, having been merged into Solgar Realty, Inc. (a non-defendant corporation) in December 1986, was not in existence when this action was filed. This Court will not decide that motion in light of its ruling that plaintiffs have no viable claim at all.

property at Ocean Pines, a resort community located in Worcester County.

Solgar has filed a motion to dismiss. Although it denies that any joint venture agreement ever existed between the parties, its motion is not based on that ground but upon the grounds that, assuming the existence of such an agreement, (1) the agreement was too uncertain in its terms to be valid, and (2) Firth's claims are time-barred. In addressing the motion both parties have referred to matters not appearing on the face of the complaint. Accordingly, the motion will be treated as one for summary judgment. As such, it will be granted.

BACKGROUND

The development of the Ocean Pines community began in the late 1960s. Solgar purchased land there in October

1978 for the purpose of constructing a nutritional research facility. Firth, who in various capacities has been involved in the sale and development of lots at Ocean Pines since 1968, was the selling agent for this property. Solgar erected a pre-fabricated office building on the land and opened its research facility in May 1979.

During 1979 Solgar became interested in purchasing an undeveloped tract at Ocean Pines known as Section 14-C. In the summer of that year Firth, acting in the capacity of a real estate broker, showed that property to Skolnick. Firth also expressed interest in becoming involved with Solgar in a joint venture for the development of the tract. A general outline of the proposed terms for such a venture was set forth in a letter agreement dated August 24,

1979 sent to Firth by Richard Lippe, an attorney forSolgar.\2 However, this agreement was never executed either by Firth or Solgar, and Section 14-C was eventually sold to someone else.

Two years later, in October 1981, Solgar purchased Section 14-B, an entirely separate tract from Section 14-C. Firth alleges that prior to this purchase he and Skolnick had reached the alleged oral joint venture agreement

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\2. Three days later Lippe sent another letter to Firth stating that provisions in the August 24th letter relating to the percentage of profit sharing would have to be revised because they did not adequately take into account Firth's dual roles as the "finder" of the tract and as the general contractor for its development.

which is the subject of this case Factual matters are, at least on the present record, in dispute as to whether or not that agreement was ever made. However, certain facts are undisputed. These include (1) that none of the plaintiffs contributed anything to the $850,000 purchase price for the property or the $350,000 in costs thus far incurred in connection with its development; (2) that none of the plaintiffs have had any day-to-day responsibilities in connection with the acquisition, development or sale of the property; (3) that, on June 1, 1984, Skolnick wrote to Firth stating that "there is no agreement between us" concerning Section 14-B; and (4) that this suit was filed on September 2, 1987.

DISCUSSION

Uncertainty of the Terms of the Alleged Agreement

In paragraphs 4 and 5 of the complaint plaintiffs allege:

> 4. At the time that Section 14-C became unavailable, the Defendant Allen Skolnick met with Plaintiff Richard K. Firth in the Plaintiff's Ocean Pines office, and they, on behalf of themselves individually and on behalf of the corporate parties named herein, agreed to form a partnership or joint venture for the acquisition, development and eventual sale of Section 14-B of the Ocean Pines

subdivision.

5. The terms of the partnership were the same as before, namely that

(a) Defendants would provide funds for acquisition and development of partnership real estate.

(b) Plaintiffs would serve as general contractor, and working partners, having day to day responsibility for supervising the development of the project.

(c) the parties would share profits and losses, with profits being allocated on the firs$1,500,000 profit 20% to Plaintiffs and 80% to Defendants, on the profit between $1,500,000 and $2,500,000 25% to Plaintiffs and 75% to Defendants; on any profit over $2,500,000 30% to

Plaintiffs 70% to Defendants.

Plaintiffs admit that these allegations are quite skeletal in setting forth what the terms of the alleged oral agreement were. However, they contend that they are sufficient to meet the "notice pleading" requirements of the Federal Rules. If this were the only issue here presented, this Court might simply order that plaintiffs amend the complaint to provide further particulars. However, plaintiffs have already foretold in their memorandum opposing Solgar's motion what their further particulars would be. Thus, the question of whether the terms of the alleged oral agreement were sufficiently definite to make the agreement valid can now be decided.

Plaintiffs contend that sufficient certainly to the terms of the alleged oral agreement can be found in the fact that, according to them, Firth and Skolnick agreed "to proceed with the development of ...[Section 14-B] as a joint venture under terms similar to those set forth in Mr. Lippe's letter of August 24, 1979." Plaintiffs' reliance upon that letter as providing the necessary certainty is misplaced for at least three reasons.

First, even Firth assets that the terms of the agreement for Section 14-B were to be "similar" to those contained in the August 24th letter. Perhaps his hesitancy to state unequivocally that the parties incorporated the precise terms of the August 24th letter into their alleged Section 14-B agreement is due to his recognition that many of the

terms of the August 24th letter (including those relating to a feasibility study, an option and the purchase price) were particular to Section 14-C and were not transferrable to the alleged oral agreement. Perhaps it is due, instead, to the fact that the parties never reached agreement as to the terms set forth in the August 24th letter even as to Section 14-C itself. In any event, definiteness and certainly are not provided by Firth's averment of "similarity" between the terms of the August 24th letter and the alleged oral agreement.

Second, in one critical respect, plaintiff's reliance upon the August 24, 1979 letter caused greater, not lesser, uncertainty. That letter contemplated an agreement between "Firth Construction, Inc." and Solgar Company, Inc. In this

action plaintiffs allege that the purported oral agreement was between Firth, individually, Firth Construction Company and Firth Realty, Inc., on the one hand, and Solgar Maryland Realty, Inc., Solgar Company Inc. and Skolnick, on the other. Thus, there is a lack of definiteness to one of the matters which is most material to any agreement: the identity of the parties to it.

Third, the August 24, 1979 letter contains no provision whatsoever relating to the sharing of losses. Such a provision "is the critical indicator of joint venturer status." Institutional Management Corp. v. Translation Systems, Inc., 456 F.Supp 661, 666 (D. Md. 1978) (citations omitted); see also Brenner v. Plitt, 182 Md. 348, 355, 34 A.2d 853, 857 (1943).

Plaintiffs next attempt to find sufficient certainty in the alleged agreement by arguing that, to the extent that its terms were not specifically agreed upon by the parties, they are supplied by reference to the Uniform Partnership Act. This contention is unpersuasive. The Uniform Partnership Act provides absolutely no guidance on a variety of material issues left undecided in the agreement, including the identity of the parties to it, how "funds for acquisition and development of partnership real estate' were to be provided by Solgar, the management and fiscal responsibilities which plaintiffs were to play "as general contractor and working partners," the formula by which profits were to be determined, the manner in which the property was to be developed and the allocation of power

for making partnership decisions. This Court cannot settle such issues where they have not been resolved by the parties themselves. See McGinn v. American Bank Stationery Co., 233 Md. 130, 132-33, 195 A.2d 615, 616 (1963). Rather, it is incumbent upon the parties to "express themselves in such terms that it can be ascertained to a reasonable degree of certainty what ... [their] agreement meant." If they have not done so, their agreement is not valid. See Strickler Engineering Corp. v. Seminar, Inc., 210 Md. 93, 101, 122 A.2d 563, 568 (1956); accord Marmott v. Maryland Lumber Co., 807 F2d 1180, 1183 (4th Cir. 1986), cert. denied, 107 S.Ct. 3214 (1987).

Limitations

Even if it were assumed that the alleged oral agreement is sufficiently certain and definite in its terms to be valid, plaintiffs' claims would be barred by limitations. By a letter dated June 1, 1984, Skolnick, on behalf of Solgar, wrote to Firth making it crystal clear that "there is no agreement between us" as to Section 14-B. This suit was not filed until more than three years later on September 2, 1987.

Plaintiffs argue that, despite their being on clear notice of Solgar's position in June 1984, limitations have not yet run and, indeed, have not even begun to run because no profits from the sale of lots at Section 14-B have yet

occurred.\3 In making this argument, Plaintiffs have facilely re-characterized what they alleged the agreement to have been. In the complaint they aver that the agreement was "to - form a partnership or joint venture for the acquisition, development and eventual sale of Section 14-B ...." In their memorandum opposing Solgar's motion they now assert that what is in issue is "a joint venture agreement for profit sharing incident to the acquisition, development and eventual

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\3.It might be noted that this argument seems to be an afterthought. The timing of the filing of this suit clearly seems to relate to a second letter, dated September 6, 1984, from Skolnick to Firth reiterating Solgar's position that there was no agreement between them.

sale of Section 14-B...." Such dexterity in pleading underscores the necessity for an agreement sufficiently definite in its terms to prevent after-the-fact restructuring of what allegedly was agreed upon. It is also insufficient to save plaintiffs' claims from being time-barred.

Self-evidently, the alleged agreement is not simply one to share profits but a partnership or joint venture to work together to acquire, develop and eventually sell property for profit. This relationship was not to spring into being when the profits were finally earned but was to be a continuing one, pre-existing Solgar's purchase of Section 14-B. If that agreement had been made, Solgar breached it when it unilaterally proceeded with the acquisition and development of

Section 14-B without plaintiffs' involvement.\4 Furthermore, even if Solgar's conduct could somehow be deemed to have been ambiguous in this regard, Skolnick's June 1, 1984 letter clearly stated his position that there was "no agreement between us."

Plaintiffs make a secondary argument in regard to the limitations question which is an untenable as their first. They contend that their claim for an accounting for profits will not

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\4. If, as plaintiffs allege, the August 24, 1979 letter provided the terms governing the parties' agreement, an unequivocal act of breach occurred immediately upon the making of the agreement, when Solgar failed to pay one John Stanton a weekly salary, as called for by paragraph (f) of the letter.

accrue until the alleged partnership is dissolved, and that the partnership has never been dissolved because Solgar has never sought a judicial decree terminating it under Md. Corps. & Ass'ns Code Ann. Section 9-603 (1985). This contention turns reason upon its head. Solgar denies that there ever was any partnership between the parties, and it unequivocally so notified plaintiffs. It makes no sense to say that Solgar was under an obligation to seek judicial dissolution of a relationship which in its view never came into existence. Furthermore, Section 9-602(2) provides that a partnership may be dissolved in contravention of the partners' agreement "by the express will of any partner at any time." Plaintiffs argue that this section does not apply here because Section 9-602(2) applies only where the

circumstances do not permit a dissolution under another provision of Section 9-602, and Section 9-602(6) provides for judicial dissolution under Section 9-603.Assuming that plaintiffs' interpretation of the interrelationship between Section 9-602(2) and 9-602(6) is proper (an issue as to which this Court has substantial doubt), they have made no showing that, assuming that the alleged partnership agreement existed, Solgar would have been entitled to obtain its dissolution under Section 9-603.

In summary, this Court finds that the alleged oral agreement is too uncertain and indefinite in its terms to be valid and that, in any event, plaintiffs' claims are time-barred. A separate order effecting these rulings is being entered herewith.

Date: June 24, 1988

J. Frederick Motz

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

RICHARD K. FIRTH

v. * Civil No.

*JFM-87-3208

*

SOLGAR MARYLAND REALTY, INC.*

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ORDER

For the reasons stated in the

opinion entered herein, it is this 24th day of June 1988

ORDERED

1. Defendants' motion to dismiss is treated as one for summary judgment and is granted and;

2. Judgment is entered in favor of defendants against plaintiffs.

J. Frederick Motz

United States District Judge

RICHARD K. FIRTH #1 Manklin Court, Ocean Pines Berlin, MD 21811	*	IN THE CIRCUIT COURT FOR WORCESTER COUNTY STATE OF MARYLAND
and	*	
FIRTH CONSTRUCTION #1 Manklin Court, Ocean Pines Berlin, MD 21811	*	Case No. 87CV0782 Docket No. G32/124
and	*	
RICK FIRTH REALTY INC. #1 Manklin Court, Ocean Pines Berlin, MD 21811	*	
Plaintiffs	*	
v.	*	
SOLGAR MARYLAND REALTY, INC. Serve Resident Agent: DAVID H. FISHMAN 1200 Garrett Bldg. 223 Redwood Street Baltimore, MD 21202 (Baltimore City)	*	
and	*	
SOLGAR COMPANY INC. Serve President ALLEN SKOLNICK 410 Ocean Avenue Lynbrook, NY 11563	*	
and	*	

ALLEN SKOLNICK *
410 Ocean Avenue
Lynbrook, NY 11563 *

* * *

COMPLAINT

Count I
(Contract)

Richard K. Firth, Firth Construction Corp. and Rick Firth Realty, Inc., Plaintiffs, sue Solgar Maryland Realty, Inc., Solgar Company, Inc. and Allen Skolnick, Defendants, for that:

1. On or about August, 1979, the parties hereto formed a partnership for the acquisition, development, and eventual sale of Section 14-C of the Worcester County Maryland subdivision known as Ocean Pines.

2. The terms of the partnership were in essence that:

(a) Defendants would provide funds for acquisition and development of partnership real estate.

(b) Plaintiffs would serve as general contractor, and working partners, having day to day responsibility for supervising the development of the project.

(c) the parties would share profits and losses, with profits being allocated on the first $1,500,000 profit 20% to Plaintiffs and 80% to Defendants: on the profit between $1,500,000 and $2,500,000 25% to Plaintiffs and 75% to Defendants; on any profit over $2,500,000 30% to Plaintiffs 70% to Defendants.

3. Although the parties hereto began negotiations for the purchase of the said section 14-C, the property was sold to an unrelated buyer.

4. At the time that Section 14-C became unavailable, the Defendant Allen Skolnick met with Plaintiff Richard K. Firth in the Plaintiff's Ocean Pines

office, and they, on behalf of themselves individually and on behalf of the corporate parties named herein, agreed to form a partnership or joint venture for the acquisition, development and eventual sale of Section 14-B of the Ocean Pines subdivision.

5. The terms of the partnership were the same as before. namely that

(a) Defendants would provide funds for acquisition and development of partnership real estate.

(b) Plaintiffs would serve as general contractor. and working partners, having day to day responsibility for supervising the development of the project.

(c) The parties would share profits and losses, with profits being allocated on the first $1,500,000 profit 20% to Plaintiffs and 80% to Defendants; on the profit between $1,500,000 and

$2,500,000 25% to Plaintiffs and 75% to Defendants; on any profit over $2,500,000 30% to Plaintiffs 70% to Defendants.

6. Having reached the agreement above related, the Plaintiff Richard K. Firth, on behalf of himself and on behalf of Rick Firth Realty, Inc. and Firth Construction Corporation, began undertaking negotiations for the acquisition of Section 14-B.

7. Plaintiff Firth, in addition, obtained surveyors and other support professionals, and sub-contractors, as required, all of which eventually culminated in a successful acquisition, and continued to serve thereafter as working partner on behalf of the other Plaintiffs.

8. That after several years of complex negotiations and work-up. the

property was purchased by the partnership, or joint venture as the case may be, for $850,000.

9. That following the acquisition, it was agreed to forestall immediate development of the property, due in part to various building moratoriums in the area, and also to allow the property, in large part waterfront residential lots, to increase in value.

10. On September 6, 1984, the Defendants forwarded to the Plaintiff Firth a letter terminating the partnership, or joint venture as the case may be.

11. The Defendants have wrongfully terminated the partnership agreement.

12. That if not in actual breach of the parties' agreements said letter constitutes an anticipatory breach of said agreements.

13. Plaintiffs performed all aspects of their agreements with the Defendants.

14. As a direct and proximate breach of the partnership agreement, or joint venture agreement as the case may be, as aforesaid, the Plaintiffs have suffered damages in the nature of lost profits, lost income, lost participation in a multimillion dollar project, and other consequential damages.

WHEREFORE, Plaintiffs claim $10,000,000.00 compensatory damages.

Count II

(Declaratory Judgement)

Richard K. Firth, Firth Construction Corp. and Rick Firth Realty, Inc., Plaintiffs, sue Solgar Maryland Realty, Inc., Solgar Company, Inc. and Allen Skolnick, Defendants, for that:

1. This is an action for Declaratory Relief under Courts Art. §3-401 et. seq. to declare the Plaintiffs' rights in and to a certain partnership agreement. for an accounting of income, benefits and property interests received by the Defendants, and for the imposition of resulting and constructive trusts in and to certain partnership real estate titled in the name of one or more of the partners.

2. Plaintiffs incorporate herein and adopt by reference pursuant to Rule 2-303(d) the factual allegations of paragraphs 1-12 of Count I as fully as if they had been set forth fully herein.

3. That an actual controversy exists among the parties in that the Defendants contend there is no partnership, and the Plaintiffs contend that there is a partnership.

4. That subsequent to the acquisition of the parcel known as Section 14-B, Plaintiffs served as working partners in that they met with surveyors, accountants, engineers, paving contractors, utility representatives, and also obtained estimates from various builders for contruction of improvements.

5. That the Plaintiffs rights, status, and legal relations are governed by the above mentioned oral partnership agreement, for which there is a written memorandum of it, in that the parties agreed to apply the terms of their written agreement for Section 14-C, to their relationships in the development of Section 14-B.

6. That the parties present antagonistic claims which have resulted in this litigation.

7. That the issuance of a declaration of the parties' rights will terminate the present uncertainty and controversy giving rise to these proceedings.

WHEREFORE. Plaintiffs request:

(a) That the Court declare the rights, interest, and obligations of the parties in and to a partnership agreement for the acquisition, development and sale of Section 14-B, Ocean Pines.

(b) That the Court declare the rights and property interests of the Plaintiffs in and to §14-B, Ocean Pines, Worcester County Maryland.

(c) That the Court order an accounting pursuant to Corp. and Assoc. Article §9-405.

(d) That a constructive trust be imposed on all property in §14-B owned by the Defendants or their successors in interest.

(e) That the Court impose a resulting trust on all property rightly belonging to the partnership.

(f) That in the alternative, compensatory damages of $7,500,000 be awarded Plaintiffs.

(g) Declare that the Defendants are in breach of their agreements with Plaintiffs.

(h) That all other appropriate supplementary relief under Courts Art. §3-412 be granted.

RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

FIRTH CONSTRUCTION CORP.

by

RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

RICK FIRTH REALTY INC.

by _____

RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

RICHARD K. FIRTH et al.	*	IN THE CIRCUIT
	*	COURT FOR
Plaintiffs	*	WORCESTER COUNTY
v.	*	STATE OF MARYLAND
SOLGAR MARYLAND REALTY Inc., et al.	*	Case No. 87CU0782
	*	Docket No. G32/124
Defendants	*	

REQUEST FOR JURY TRIAL

and the Plaintiffs elect to have the case tried before a jury.

RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

FIRTH CONSTRUCTION CORP.

by _____
RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

RICK FIRTH REALTY INC.

by _____

RICHARD K. FIRTH
#1 Manklin Court
Ocean Pines
Berlin, Maryland 21811
301/641-8585

August 24, 1979

Mr. Richard K. Firth, Pres.
Firth Construction, Inc.
Route 4, Box 3806
Berlin, Maryland 21811

Dear Rick:

Based on our prior meeting as well as our telephone conversation of today, it is my understanding that Firth Construction, Inc. ("FCI") is interested in entering into a joint venture with Solgar Company, Inc. ("Solgar") for the acquisition, development and sale of the thirty (30) filled acres located in Section 14(C) in Ocean Pines, Maryland (the "property") as set forth in your letter of June 18, 1979. The purpose of this letter is to set forth the general terms and conditions that will govern the relationship between Solgar and FCI:

(a) During the forty-five (45) day period subsequent to the date of this

letter, Solgar, with your assistance, will seek to evaluate the financial feasability and desirability of acquiring the property and developing it in accordance with the general guidelines set forth in your letter of June 18, 1979. Solgar's investigation will include, but not be limited to, determining whether there will be any difficulty involved in obtaining a building permit, whether the issuance of the building permit is subject to complying with any governmental regulations of any environmental nature, whether the projected price for the land is consistent with prevailing property values, whether the projected price for the sale of dwelling units is consistent with similar units currently being sold in the area, and whether the current condition of the bulkheads present any problems with respect to future

development and/or the acceptance of these bulkheads by the municipality and Homeowner's Association.

(b) In consideration of the time and money that will be spent by Solgar in connection with its activities as described in "(a)" above, FCI and Richard K. Firth ("Firth") and John L. Stanton ("Stanton"), individually, hereby grant to Solgar an exclusive option during the next forty-five (45) days to participate with them in the acquisition, development and sale of the above described property. In the event that Solgar exercises its option by written letter during this time period, then FCI, Firth and Stanton agree that they will not, directly or indirectly, at any time in the future acquire any interest in said property without affording Solgar the opportunity to participate in said acquisition in accordance with the

terms and conditions set forth in this letter agreement. Likewise, Solgar and Allen Skolnick, individually, both agree that they will not seek, directly or indirectly, to acquire the property from Boise Cascade ("Boise") except with the participation of FCI in accordance with the terms of this letter agreement.

(c) In the event that Solgar exercises its option as set forth in paragraph "(b)" above, then Solgar will provide the funds necessary for the acquisition of the property from Boise provided that suitable terms and conditions can be arrived at with Boise. Provided that the bulkheads are in suitable condition and that there are no other unanticipated problems, then Solgar is prepared to purchase the property for $400,000.00, up front, in cash, or for a price of $440,000.00 with a $100,000.00 down payment with the

balance of the purchase price paid over a suitable period of time.

(d) In the event that Solgar purchases the property, then it will provide the funds necessary for development of said property in accordance with development plans which are suitable and approved by Solgar.

(e) In the event that the property is purchased by Solgar, then Solgar will also provide the funds to meet administrative and soft dollar costs including, but not limited to, office and telephone expenses, promotional expenses and legal, accounting and architectural services. It is currently contemplated that Solgar will provide office space at its office building located in Maryland and that the offices will be relocated to a sample home when one or more of these are available.

(f) It is understood and agreed that during the acquisition, development and sale of the property, FCI shall have overall day-to-day responsibility as the General Contractor, for supervising the project and implementing all details associated therewith subject to control by Solgar, as the owner of the property, who, as such, shall have completed discretion to replace FCI or any other personnel associated with the project. In this connection, John Stanton, the Vice-President of FCI, will devote one hundred (100%) percent of his time to the project and Solgar will pay to him, as an advance, the gross sum of $25,000.00 annually, paid on a weekly basis. This weekly advance will be paid for such reasonable period of time, as determined by Solgar, as is anticipated will be required before the project will generate revenues through the sale of

developed lots and/or dwelling units. It is further understood and agreed that Firth will devote such time as is necessary to the project but will received no advance or any compensation in connection with said efforts.

(g) It is understood and agreed that the joint venture will act as it own broker or that, in it discretion, Solgar shall have the right to subcontract out the brokerage services.

(h) It is understood and agreed that the proceeds of the joint venture shall be divided as follows:

1. Up to the first $1,500,000 and $2,500,000 of net profits, Solgar shall receive twenty (20%) percent.

2. Up to between $1,500,000 and $2,500,000 of net profits, Solgar shall receive seventy-five (75%) percent and FCI shall receive twenty-five (25%) percent.

3. In excess of $2,500,000 of net profits, Solgar shall receive seventy (70%) percent and FCI shall receive thirty (30%) percent.

It is understood that FCI's profit participation shall be dependent on its continuing good faith willingness to fulfill its day-to-day responsibility for supervising the project and implementing all details associated therewith provided that its right to participate in said profits shall not be affected in the event that Solgar, as the owner of the property, determines to replace FCI or any of its personnel. Net profits shall be the sums remaining after Solgar has received repayment of all sums advanced or otherwise paid by it in connection with the acquisition, development and sale of the property including, but not limited to, the purchase price of the property, the advances to

Stanton, promotional expenses, legal, accounting and architectural fees and all other expenditures made by Solgar in connection with the project.

(i) It is understood and agreed that FCI has made possible the purchase of the property. Accordingly, if Solgar exercises its option and purchases the property, then FCI shall have the right to participate in the profits. If at any time in the future the property or any dwelling units constructed thereon are sold, this shall be a continuing right of FCI's and shall exist even in the event that Solgar chooses not to develop the property or chooses to substitute persons other than FCI, Stanton or Firth to assist in the development of said property.

(j) The parties agree that in the event Solgar exercises its option and

purchases the property, then for a period of six (6) years from the date of this agreement, Solgar, FCI, Skolnick, Firth and Stanton agree that they will not, directly or indirectly, acquire any interest in any real property located in Ocean Pines, Maryland for sale or development without offering participation in said acquisition to Solgar and FCI in accordance with the terms of this contract except that FCI shall have the right to agree to provide fifty (50%) percent of the monies required in which event it shall have the right to receive fifty (50%) percent of the profits arising therefrom.

If this letter sets forth our agreement, please be good enough to execute it below where indicated. I

will then forward it to Solgar Company, Inc. for its approval and execution.

Very truly yours,

RICHARD A. LIPPE

RAL:ks

AGREED AND CONSENTED TO:

FIRTH CONSTRUCTION, INC.

BY:_____

_____

RICHARD K. FIRTH

_____

JOHN L. STANTON

SOLGAR COMPANY, INC.

BY:_____

Respondents' 41 Questions and Related Arguments Raised in Motion to Dismiss Filed by Attorneys Meltzer. Lippe, Goldstein & Wolf, P.C.

The acquisition, development and sale of Section 14-B could not, by any stretch of the imagination, be characterized as a simple and uncomplicated transaction. It clearly was going to involve millions of dollars and take several years to bring to fruition. According to plaintiff. the provisions of the alleged oral agreement between the parties addressed only one or two of the numerous critical issues which would invariably be discussed and negotiated in a transaction of this type. Such a bare-bones "agreement" therefore leaves ambiguous and unresolved a large number of material issues, including the following:

- who would be the partners in the joint venture? would it be Firth and Skolnick individually? would it be Solgar Co. Inc. and Firth Construction Corp.? would it be a new entity?

- how much money would Solgar be obligated to contribute to the project? were its financial obligations unlimited? was it obligated to purchase 14-B regardless of cost? having purchased 14-B, was it obligated to spend whatever amount was necessary to develop the property? when would Solgar be required to make its capital contribution? would Solgar receive any interest on the capital it contributed to the venture? would Solgar be obligated to take a mortgage on the property to raise funds? if so, would Firth have any liability for the mortgage debt? would Firth have to put up any collateral to secure the mortgage loan?

- what was plaintiff's responsibility as a "general contractor"? was he obligated to supply all labor and materials at his expense? was Solgar obligated to pay all these expenses, and was plaintiff contributing only his expertise? if plaintiff was contributing only his expertise, what would happen in the event of his death? how much time was plaintiff required to devote to the project? would plaintiff receive any compensation for the

time and services he contributed to the joint venture?

- how would the property be developed? when would the property be developed? who would have the responsibility for making these decisions? were there any parameters or timetables for this development? when would the property be sold? at what price? who would have control of the joint venture? would plaintiffs and defendants have equal control over the partership, or would control be divided according to the same percentages as the profits? would any decisions require an unanimous vote?

- how would "profits" be determined? what costs were to be included within "development costs"? when would the partners be able to withdraw cash or profits from the project? how would profits and losses be allocated for tax purposes? who would be responsible for the payment of taxes, insurance, attorney's fees, etc.?

- how long would the joint venture last? what would happen upon liquidation? could a partner transfer his interest in the joint venture? upon what terms? what would happen if one of the corporate members of the joint venture dissolved or went out of business? what were the consequences if a partner defaulted in

its obligations? did participation in the joint venture place any restrictions on other activities of the partners? could Solgar or Firth engage in any other development projects at Ocean Pines separately from the other?

In sum, if the parties, whoever they were supposed to have been, had ever reached an "agreement", it was an agreement which in fact constituted a "meeting of the minds" on virtually none of the numerous important items that are generally negotiated as part of such a contract.